SCC File No. 41605

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N :

ATTORNEY GENERAL OF QUÉBEC

Appellant / Respondent on Cross-Appeal

- and -

JOSEPH-CHRISTOPHER LUAMBA

Respondent / Appellant on Cross-Appeal

- and -

ATTORNEY GENERAL OF CANADA
CANADIAN CIVIL LIBERTIES ASSOCIATION
CANADIAN ASSOCIATION OF BLACK LAWYERS

Respondents

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CLINIQUE JURIDIQUE DE SAINT-MICHEL, COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, PROCUREUR GÉNÉRAL DU CANADA, PROCUREUR GÉNÉRAL DE L'ONTARIO, PROCUREUR GÉNÉRAL DE LA COLOMBIE BRITANNIQUE, PROCUREUR GÉNÉRAL DE SASKATCHEWAN, PROCUREUR GÉNÉRAL DE L'ALBERTA, PUBLIC INTEREST LITIGATION INSTITUTE, AKWESASNE JUSTICE DEPARTMENT, WOMEN'S LEGAL EDUCATION AND ACTION FUND, CANADIAN ASSOCIATION OF CHIEFS OF POLICE, AFRICAN NOVA SCOTIA JUSTICE INSTITUTE, BLACK LEGAL ACTION CENTRE, MOTHERS AGAINST DRUNK DRIVING (MADD CANADA), ONTARIO HUMAN RIGHTS COMMISSION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

FACTUM OF THE INTERVENER
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Megan Savard
Riaz Sayani
Savards LLP
26 Soho Street, Suite 400
Toronto, ON M5T 1Z7
Tel: (416) 789-7843
megan@savards.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

Jean-Simon Schoenholz
Norton Rose Fulbright Canada LLP
99 Bank Street, Suite 500
Ottawa, Ontario K1P 6B9
Tel: (613) 780-1537
jean-simon.schoenholz@nortonrosefulbright.com

Agent for the Intervener, David Asper Centre for Constitutional Rights

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Michel Déom
Luc-Vincent Gendron-Bouchard
Aurélie Fortin
Procureur général du Québec Bernard, Roy (Justice-Québec)
1, rue Notre-Dame Est, Bureau 8.00
Montréal, Quebec H2Y 1B6
Tel: (514) 393-2336 Ext: 51498:
michel.deom@justice.gouv.qc.ca

Counsel for the Appellant, Procureur général du Québec

Pierre Landry
Noël et Associés, s.e.n.c.r.l.
225, montée Paiment
2e étage
Gatineau, Quebec J8P 6M7
Tel: (819) 771-7393
p.landry@noelassocies.com

Agent for the Appellant, Procureur général du Québec

Mike Siméon
Bureau 1610
2000, rue Mansfield
Montréal, Quebec H3A 3A4
Tel: (514) 380-5915
msimeon@mslex.ca

Counsel for the Respondent, Joseph-Christopher Luamba

Marc Ribeiro
Miriam Clouthier
Procureur général du Canada
Complexe Guy-Favreau, Tour Est, 5e étage
200, boul. René Lévesque Ouest
Montréal, Quebec H2Z 1X4
Tel: (514) 283-6272
marc.ribeiro@justice.gc.ca

Counsel for the Respondent, Attorney General of Canada

Bernard Letarte
Department of Justice Canada
National Litigation Sector
275 Sparks Street, St-Andrew Tower
Ottawa, Ontario K1A 0H8
Tel: (613) 294-6588
SCCAgentCorrespondentCSC@justice.gc.ca

Agent for the Respondent, Attorney General of Canada

Alexandra (Lex) Gill
Bruce W. Johnston
Louis-Alexandre Hébert-Gosselin
Trudel Johnston & Lespérance
750, côte de la Place-d'Armes,
suite 90
Montréal, Quebec H2Y 2X8
Tel: (514) 871-8385 Ext: 219
lex@tjl.quebec

Counsel for the Respondent, Canadian Civil Liberties Association

Karine Joizil
Sajeda Hedaraly
McCarthy Tétrault LLP
1000 De La Gauchetière Street West
Suite MZ400
Montréal, Quebec H3B 0A2
Tel: (514) 397-4129
kjoizil@mccarthy.ca

Counsel for the Respondent, Canadian Association of Black Lawyers

Vincent Larochelle
Ga Grant
Larochelle Law
303B Hawkins Street
Whitehorse, Yukon Territory Y1A 1X5
Tel: (867) 456-2325
vincent@larochellelaw.ca

Counsel for the Intervener, British Columbia Civil Liberties Association

Maxine Vincelette
Power Law
50 O'Connor Street, Suite 1313
Ottawa, Ontario K1P 6L2
Tel: (613) 702-5573
mvincelette@juristespower.ca

Agent for the Intervener, British Columbia Civil Liberties Association

Fernando Belton
Dardia Garcelle Joseph
Sarah Warda
Clarisse Émond-Larochelle
Belton Avocat Inc.
3737, boul. Crémazie Est
Suite 801
Montréal, Quebec H1Z 2K4
Tel: (514) 794-5917
fbelton@cjsm.ca

Counsel for the Intervener, Clinique juridique de Saint-Michel

Christine Campbell
Emma Tardieu
Bitzakidis, Clément-Major, Fournier
2e étage
360, rue Saint-Jacques
Montréal, Quebec H2Y 1P5
Tel: (514) 873-5146 Ext: 8384
christine.campbell@cdpdj.qc.ca

Counsel for the Intervener, Commission des droits de la personne et des droits de la jeunesse

Robert Palser
Alberta Crown Prosecution Service
3rd Floor, Bowker Building
9833 – 109 Street
Edmonton, Alberta T5K 2E8
Tel: (780) 422-5402
robert.palser@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

D. Lynne Watt
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-8695
lynne.watt@gowlingwlg.com

Agent for the Intervener, Attorney General of Alberta

Noah Wernikowski
Ministry of Justice Saskatchewan
820-1874 Scarth Street
Constitutional Law Branch
Regina, Saskatchewan S4P 4B3
Tel: (306) 786-0206
noah.wernikowski@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan

D. Lynne Watt
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-8695
lynne.watt@gowlingwlg.com

Agent for the Intervener, Attorney General of Saskatchewan

James V. Palangio
Matthew Morley
Attorney General of Ontario
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9
Tel: (416) 326-4600
james.palangio@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9
Tel: (613) 787-3562
neffendi@blg.com

Agent for the Intervener, Attorney General of Ontario

Marc Ribeiro
Michelle Kellam
Procureur général du Canada
Complexe Guy-Favreau, Tour Est, 5e étage
200, boul. René Lévesque Ouest
Montréal, Quebec H2Z 1X4
Tel: (514) 283-6272
marc.ribeiro@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

Bernard Letarte
Department of Justice Canada
National Litigation Sector
275 Sparks Street, St-Andrew Tower
Ottawa, Ontario K1A 0H8
Tel: (613) 294-6588
SCCAgentCorrespondentCSC@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

Micah Rankin, K.C.
Rome Carot
Attorney General of British Columbia
B.C. Prosecution Service
3rd Floor, 940 Blanshard Street
Victoria, British Columbia V8W 3E6
Tel: (778) 974-3344
micah.rankin@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

Matthew Estabrooks
Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: (613) 786-0211
matthew.estabrooks@gowlingwlg.com

Agent for the Intervener, Attorney General of British Columbia

Lawrence David
Public Interest Litigation Institute
1030 Berri Street – Suite 102
Montreal, Quebec H2L 4C3
Tel: (343) 961-6186
ldavid@clg.org

Counsel for the Intervener, Public Interest Litigation Institute

Neha Chugh
Anne-Marie McElroy
Chugh Law Professional Corporation
28 First Street West
Cornwall, Ontario K6J 1B9
Tel: (613) 938-0000
neha@chughlaw.ca

Counsel for the Intervener, Akwesasne Justice Department

Akosua Matthews
Katia Snukal
Kastner Ko LLP
55 University Avenue, Suite 1800
Toronto, Ontario M5J 2H7
Tel: (416) 655-3044 Ext: 814
amatthews@kastnerko.com

Counsel for the Intervener, Women's Legal Education and Action Fund

Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9
Tel: (613) 787-3562
neffendi@blg.com

Agent for the Intervener, Women's Legal Education and Action Fund

Simon Authier
Vancouver Police Department
2120 Cambie Street
Vancouver, British Columbia V5Z 4N6
Tel: (604) 717-0727
simon.authier@vpd.ca

Lynda A. Bordeleau
Perley-Robertson, Hill & McDougall
1400 - 340 Albert Street
Ottawa, Ontario K1R 0A5
Tel: (613) 238-2022
lbordeleau@perlaw.ca

Counsel for the Intervener, Canadian Association of Chiefs of Police

Agent for the Intervener, Canadian Association of Chiefs of Police

Lee V. Seshagiri
Brandon P. Rolle
Alexander J. MacKillop
African Nova Scotian Justice Institute
5832 Bilby Street
Halifax, Nova Scotia B3K 1V8
Tel: (902) 420-3471
lee.seshagiri@nslegalaid.ca

Marie-France Major
Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, Ontario K2P 0R3
Tel: (613) 695-8855 Ext: 102
mfmajor@supremeadvocacy.ca

Counsel for the Intervener, African Nova Scotian Justice Institute

Agent for the Intervener, African Nova Scotian Justice Institute

Annamaria Enenajor
Sabrina Shillingford
Ruby Shiller Enenajor DiGiuseppe Barristers
197 Spadina Avenue
Suite 402
Toronto, Ontario M5T 2C8
Tel: (416) 964-9664 Ext: 107
aenenajor@rubyshiller.com

Marie-France Major
Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, Ontario K2P 0R3
Tel: (613) 695-8855 Ext: 102
mfmajor@supremeadvocacy.ca

Counsel for the Intervener, Black Legal Action Centre

Agent for the Intervener, Black Legal Action Centre

Earl A. Cherniak, Q.C.
Jacob Damstra
Debbie Boswell
Lerners LLP
130 Adelaide Street West, Suite 2400
Toronto, Ontario M5H 3P5
Tel: (416) 601-2350
echerniak@lerners.ca

Catherine Ouellet
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1A 5C6
Tel: (613) 786-0189
Catherine.Ouellet@gowlingwlg.com

Counsel for the Intervener, Mothers Against Drunk Driving (MADD Canada)

Agent for the Intervener, Mothers Against Drunk Driving (MADD Canada)

Roger Love
Nina Gandhi
Ontario Human Rights Commission
180 Dundas St., W., 9th Floor
Toronto, Ontario M7A 2G5
Tel: (416) 618-2390
roger.love@ohrc.on.ca

Bijon Roy
Champ and Associates
43 Florence Street
Ottawa, Ontario K2P 0W6
Tel: (613) 237-4740
broy@champlaw.ca

Counsel for the Intervener, Ontario Human Rights Commission

Agent for the Intervener, Ontario Human Rights Commission

Gerald Chan
Alexandra Heine
Stockwoods LLP
TD North Tower
4130-77 King St W
Toronto, Ontario M5K 1H1
Tel: (416) 593-1617
geraldc@stockwoods.ca

Maxine Vincelette
Power Law
50 O'Connor Street, Suite 1313
Ottawa, Ontario K1P 6L2
Tel: (613) 702-5573
mvincelette@juristespower.ca

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

Agent for the Intervener, Criminal Lawyers' Association (Ontario)

TABLE OF CONTENTS

PARTS I & II – OVERVIEW AND POSITION ON QUESTIONS IN ISSUE

1. The instant case asks this Court, for the first time, to invalidate a police power for its contribution to systemic discrimination. In so doing, it poses a challenge: how can the s. 15(1) analysis effectively accommodate and remedy "adverse effects" claims grounded in systemic racism? The David Asper Centre for Constitutional Rights intervenes to propose an answer.

2. This Court has wrestled with the implications of its commitment to substantive equality. Its members have expressed the reasonable concern that upholding this commitment sets the s. 15(1) bar too high and discourages the state from providing services. The concern is particularly acute in the context of policing: the ultimate beneficial service, yet one pervaded by bias.

3. The solution lies in the dismantling of a false binary. There is no "choice" to be made between racial justice and public safety. Canadian law recognizes what the undisputed facts on this appeal have shown: racial profiling contributes to criminalization. Actively combatting racial profiling is the way to achieve lasting public safety, not a hurdle *en route* to achieving it.

4. The Asper Centre makes no submissions on the facts. With respect to the issues, the Asper Centre submits: (a) the s. 15(1) analysis must be contextual – informed by the social reality and cyclical nature of racial profiling; (b) this Court must recommit to the "animating norm" of substantive equality, adopt a positive definition of the term and modify the s. 15(1) and s. 52 analyses accordingly; and (c) laws that confer unbounded discretionary police powers are constitutionally defective; because they create a conduit for an established and expected form of discrimination, their enactment amounts to a *prima facie* breach of s. 15(1) of the *Charter*.

PART III – STATEMENT OF ARGUMENT

A. Racial Profiling is the Rule, Not the Exception – and the State Has a s. 15(1) Duty to Counteract It

5. The s. 15(1) substantive equality guarantee includes freedom from adverse effects discrimination – where a facially neutral law disproportionately impacts a protected group.[1] Importantly, this guarantee has a corresponding positive commitment: once the state decides to

[1] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 170–171 [*Andrews*].

provide a benefit, it must do so in a non-discriminatory way.[2] Policing is one such benefit. In this Part, the Centre invites the Court to integrate three distinct lines of case law to conclude that racial profiling is an inevitable by-product of discretionary policing. This expectation of racial profiling gives rise to the corresponding s. 15(1) duty to combat it.

6. First: unconscious bias is universal. All people, including those who safeguard the justice system, carry "beliefs, assumptions, and perceptions…based on characteristics such as gender, race, ethnicity, sexual orientation, or employment status."[3] The law in turn helps justice system participants acknowledge and neutralize their most insidious biases through various rules and processes.[4] The universality of bias – and the law's corresponding responsibility to acknowledge and account for it – must inform law-makers' grants of discretion. If bias is a natural by-product of human socialization, rather than an anti-social anomaly, then the state has an obligation to factor this into its law-making, and no excuse for being surprised by it.

7. Second: racial profiling in policing undermines public safety. It is well-established that anti-Indigenous racism pervades the justice system[5] and that Black people are over-policed and over-incarcerated.[6] The evidence accepted by the courts below and the concessions of the six Attorneys General reinforce that racial profiling is "so notorious or generally accepted as not to be the subject of debate among reasonable persons."[7] More importantly, it has a cyclical effect. Discriminatory beliefs are "reinforced by the very exclusion of the disadvantaged group because

---

[2] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 73.
[3] *R v Chouhan*, 2021 SCC 26 at para 53 [*Chouhan*]. See also *R v Barton*, 2019 SCC 33 at para 196 [*Barton*]; *R v Parks*, 1993 CarswellOnt 119 (CA), leave to appeal to SCC refused 1994 CanLII 19087 (SCC) at paras 42–43; *R v Koh*, 1998 CarswellOnt 5016 (CA), at para 29.
[4] *Barton*, at paras 197, 200; *Chouhan* at paras 49, 61; *R v Abdullahi,* 2023 SCC 19 at para 86.
[5] *Barton* at para 199; *Ewert v Canada*, 2018 SCC 30 at para 57.
[6] *R v Golden*, 2001 SCC 83 at para 83 [*Golden*]; *R v Le*, 2019 SCC 34 at paras 90, 94, 97 [*Le*]; *R v Morris*, 2021 ONCA 680 at paras 1, 123.
[7] *R v Find*, 2001 SCC 32, at para 48; Factum, Appellant at para 12 [AGQ]; Factum, Attorney General of Canada at para 4 [AGC]; Factum, Attorney General of British Columbia at para 10 [AGBC]; Factum, Attorney General of Saskatchewan at paras 2–5; Factum, Attorney General of Alberta at para 6 [AGAB]; Factum, Attorney General of Ontario at paras 3–4 [AGON]. See also *Le* at paras 84, 89.

the exclusion fosters the belief… that the exclusion is the result of 'natural forces.'"[8] In the context of racial profiling, over-targeting leads to over-representation in the justice system and a degree of disenfranchisement that then contributes to criminality. As this Court held in *Le*:

> The impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience. Carding takes a toll on a person's physical and mental health. It impacts their ability to pursue employment and education opportunities… Such a practice contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization.[9]

This causal link between profiling and criminality dismantles the false contest between public safety and racial justice set up by several Attorneys General on this appeal.[10] It compels the conclusion that "fixing" racial profiling is not just a social good but a public safety necessity.

8. Third: objective standards like "reasonable suspicion" or "reasonable grounds" are necessary safeguards against the discriminatory exercise of police discretion.[11] The contrapositive is that discrimination results from their absence. The Asper Centre agrees that the powers in issue may be exercised for traffic safety purposes only,[12] however, these constraints limit only the reasons why police may stop drivers, but not their choice of which drivers to stop. Without objective limits on police discretion in who to target, the law expects police powers to be disproportionately directed against Black and Indigenous peoples.[13]

9. Having chosen to provide policing as a public safety benefit, the state must do so in a way that does not "[effectively limit] an individual or group's right to the opportunities generally available because of attributed rather than actual characteristics."[14] This Court has already found that racial profiling effectively limits Black and Indigenous people's rights to different

---

[8] *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at 1139 [*Action Travail*]. See also *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at paras 374–75; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 64.
[9] *Le* at para 95.
[10] AGQ at paras 101, 105; AGCA at para 17; AGBC at paras 7, 56; AGON at para 4, AGAB at para 20.
[11] *R v Chehil*, 2013 SCC 49 at para 30; *R v Simpson*, 1993 CarswellOnt 83 (CA), at para 61, cited with approval in *R v Mann,* 2004 SCC 52 at para 27; *Golden* at para 83.
[12] See AGQ at para 45.
[13] *R v Pike*, 2024 ONCA 608 at paras 65–66; Factum, Criminal Lawyers' Association (Ontario).
[14] *Andrews* at 174, quoting *Action Travail* at 1138, in turn quoting Abella Report at 2.

opportunities – the right to be free from state interference and the more general rights to social and economic opportunities and authorities they can trust.[15] The convergence of the authorities above establishes that racial profiling is the rule, not the exception. When it comes to police powers, therefore, s. 15(1) obligates law-makers – both in statute and at common law – to legislate in a way that accounts for and neutralizes the otherwise-inevitable impact of human bias.

B. The Court Should Flesh Out *Andrews'* Commitment to Substantive Equality

10. This Court's "adverse effects" jurisprudence is marked by ongoing tension between its commitment to substantive equality and its concern that enforcing the commitment sets the bar for compliance too high. The result has been unsatisfactory, both doctrinally and functionally.

11. Doctrinally, the failure to positively define "substantive equality" has created a "definitional void" that gives rise to incompatible analyses. In *Fraser*, for example, the impugned law violated s. 15 because it preserved a discriminatory state of affairs.[16] Two years later, in *Sharma,* there was no s. 15 violation where the impugned law preserved but did not cause or worsen the discriminatory state of affairs.[17] The risk exemplified by the pivot from *Fraser* to *Sharma* is that courts will fill the s. 15(1) definitional void with discredited "zombie concepts" from equality law's formalist past.[18]

12. Functionally, the definitional void and resulting "formal equality creep" obstructs the path to success for historically disadvantaged equality seekers. Formalist hurdles, like strict causal and evidentiary burdens, tend to immunize disproportionate impact claims from constitutional review.[19] Even before *Sharma*, s. 15(1) was conspicuously ineffective as a tool for counteracting systemic racism. As summarized by Sealy-Harrington:

> [W]ere "race" not listed as a protected ground under the *Charter*, it is not apparent…that there would have been much difference in the Supreme Court's first four decades of

---

[15] *Le* at para 95.
[16] *Fraser v Canada (Attorney General),* 2020 SCC 28 at paras 27, 90 [*Fraser*].
[17] *R v Sharma*, 2022 SCC 39, paras 42, 44, 67, Brown and Rowe JJ; *ibid* at para 226, Karakatsanis J, dissenting [*Sharma*].
[18] Margot Young, "Zombie Concepts: Contagion in Canadian Equality Law" (2023) 114 SCLR (2d) 35 at para 4.
[19] Jennifer Koshan and Jonnette Watson Hamilton, "'Clarifications' or 'Wholesale Revisions'? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada" (2023) 114 SCLR (2d) 15 at paras 25, 27.

> equality jurisprudence… [T]he Supreme Court has barely considered racial discrimination claims. Race is, thus, first listed yet last enforced – a constitutional token to a promise of racial equality left not only with little success but with little attempt.[20]

13. This case is an opportunity for the Court to affirm its commitment to substantive equality as a means of correcting historic disadvantage. It can do so by providing two clarifications to the s. 15(1) and s. 52(1) framework. First, it can adopt a positive definition of substantive equality. Second, it can adopt a principled framework, based on its reasoning in *R. v. Boudreault*, for determining the cause of systemic discrimination (defective law or state conduct).[21]

1) A positive definition: substantive equality as equal recognition

14. The "definitional void" can be filled by defining its animating norm: substantive equality.[22] Positively defined, this norm is the "goal" of the s. 15 analysis – a conceptual anchor that, in the words of the *Fraser* dissent, "renders s. 15 rights…identifiable and knowable."[23]

15. Sangiuliano's theory of "Substantive Equality as Equal Recognition" is an apt conceptual anchor. This theory defines substantive equality as "a condition in which the law does not transmit [historical disadvantage] through its [application]," thereby ensuring that the oppression associated with historical disadvantage is not given "the force of law."[24] In positive terms, substantive equality is achieved when the state actively dissociates itself from the relevant disadvantage. It does so by withholding its "stamp of approval" from oppressive systems.

16. This definition answers the complaint that substantive equality is an "infinitely malleable" norm.[25] The definition is rooted in s. 15(1)'s foundational texts[26] and this Court has implicitly

---

[20] Joshua Sealy-Harrington, "The Charter of Whites: Systemic Racism and Critical Race Equality in Canada" (2023) 39 Windsor YB Access Just 544 at 546.
[21] *R v Boudreault*, 2018 SCC 58 [*Boudreault*].
[22] *Sharma* at para 37.
[23] *Fraser* at para 218.
[24] Anthony Robert Sangiuliano, "Substantive Equality as Equal Recognition: A New Theory of Section 15 of the Charter" (2015) 52:2 Osgoode Hall LJ 601 at 609–10.
[25] *Fraser* at para 217, quoting Sangiuliano at 606–08.
[26] Abella Report at 3; *Andrews* at 171, quoting *Reference re an Act to Amend the Education Act*, 1986 CanLII 2863 (ON CA), aff'd 1987 CanLII 65 (SCC), Howland CJA and Robins JA, dissenting on a different point.

subscribed to it in the past.[27] Applied at step 2 of the s. 15(1) analysis, it is uniquely suited to adjudicate systemic discrimination claims. It avoids assigning claimants the impossible task of proving the state created or worsened their situation by asking a more precise question: does the law's application *reproduce* – and thereby endorse – a pre-existing historical disadvantage? As discussed below, the answer to this question determines whether a facially neutral law contains a "latent constitutional defect" that turns it into a conduit for historical disadvantage.

17. If adopted, the "equal recognition" theory of substantive equality will be the conceptual "goal" underpinning s. 15. This must be accompanied by appropriate modifications to the s. 15(1) "adverse impact" analysis. While the basic analytic framework established in *Andrews* and restated in *Fraser* and *Sharma* remains apt,[28] the newly defined norm – active dissociation from historically oppressive systems – may require this Court to revisit its recent *dicta* in *Sharma* to determine which parts remain relevant.[29] This Court may decide, for example, that it is no longer appropriate to "focus on the test, rather than the norm"[30] as it would transform the goal of substantive equality into a by-product. Likewise, it may be inappropriate to hold, categorically, that "leaving a gap between a protected group and non-group members *unaffected*"[31], which may reinforce the *status quo* in a way that gives the state's "stamp of approval" to a discriminatory system.

2) The Court should use the "latent constitutional defect" test to determine the discriminatory impact of a "neutral" law

18. This Court should modify the framework for identifying and remedying discriminatory but facially neutral laws. To do so, it must solve the "*Little Sisters* problem" – a jurisprudential hurdle that currently insulates neutral laws from s. 15(1) scrutiny.[32] In *Little Sisters*, customs officials "systemically" discriminated against a protected group. The Court held, however, that the source

---

[27] *Vriend v Alberta,*[1998] 1 SCR 493 at paras 102; *M v H*, [1999] 2 SCR 3 at para 73; Sangiuliano at 624–25.
[28] *Fraser* at paras 27, 169, 232; *Sharma* at para 28.
[29] See generally *Sharma* at paras 37–65.
[30] *Sharma* at paras 37–38.
[31] *Sharma* at paras 40 and 52 [emphasis in original].
[32] This hurdle attributes systemic violations like s. 15(1) discrimination to "maladministration" of a facially neutral law, instead of to a flaw in the law itself, shielding it from s. 52(1) invalidation.

of the s. 15(1) violation was not the customs legislation but the officials' implementation of it.[33] So defined, the Court could only grant a s. 24(1) remedy: the law remained valid.

19. Procedurally, the *Little Sisters* framework is flawed because it makes "disproportionate adverse effects" claims difficult to prove and virtually impossible to remedy under s. 52. At best, claimants face a remedial cul-de-sac. They can seek remedies for bad acts but cannot invalidate a facially neutral law. This sets up a costly cycle of "policing the executive" through re-litigation.[34] At worst, claimants face an evidentiary dead end: it may be impossible to prove that any specific act is motivated by discriminatory rather than legitimate grounds. The aggregate data support an inference of discrimination, but the impossibility of disaggregating it forbids any remedy at all.[35]

20. Conceptually, the *Little Sisters* framework is an inapt tool for evaluating laws that confer police powers. Its false binary of "bad actors" vs. "bad law" fails to account for the universality of bias and its manifestation as racial profiling in policing. In this context, relabelling the problem of "discrimination in the aggregate" as a problem of "bad apples" is unhelpfully judgmental. It wrongly frames bias as a morally blameworthy anomaly rather than a natural by-product of human socialization, and biased decision-making as a surprise rather than an inevitability. A law designed to be operationalized by humans must account for human frailty.

21. This Court can "solve" the *Little Sisters* problem by incorporating the concept of the "latent constitutional defect"[36] into its remedial analysis. In the analogous s. 12 case of *Boudreault*, this Court did just that: it considered whether the potential harms caused by victim fine surcharge legislation – imprisonment for default and aggressive collection efforts – were caused by the law or by its maladministration.[37] In finding the former, it held that these harms, while effected by state actors, were the "direct and known consequences" of the law's operation and therefore

---

[33] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 1, 85, 125.
[34] Alison M. Latimer and Benjamin L Berger, "A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem" (2022) 104 SCLR (2d) 143.
[35] The Asper Centre adopts the submissions of the Black Legal Action Centre and the Criminal Lawyers' Association on the impracticality of proving racial profiling on a case-by-case basis.
[36] Latimer and Berger at 143, 145, 159.
[37] Latimer and Berger at 157.

attributable to the law itself.[38] Adapted to the s. 15(1) context, the *Boudreault* approach would direct courts confronted with a facially neutral law and proof of discriminatory application to ask whether the law, by its design, created the legal conditions precedent for those harms to occur. If so, the law has a "latent constitutional defect" and is unconstitutional.

22. The *Boudreault* framework permits courts to incorporate legal and social realities into their s. 52(1) analyses in a way the *Little Sisters* framework does not. In the context of policing, for example, a law that confers a discretionary power without explicitly limiting discretion creates the "legal conditions precedent" for discrimination in the form of racial profiling.

C. This Court Should Not Recognize a Power to Effect Groundless Vehicle Stops

23. This Court has never recognized a common law police power to conduct groundless vehicle stops.[39] It should not recognize one now. To do so would be inconsistent with its obligation to apply its ancillary powers doctrine sparingly and in accordance with the *Charter.*

1) *Charter* rights must regain paramountcy within the ancillary powers doctrine

24. The Appellant's request that this Court recognize a vast and unprecedented common law power to randomly stop vehicles is a watershed moment for the ancillary powers doctrine. When first imported into Canada, the doctrine was used sparingly. In the years immediately following *Dedman*, this Court maintained its restrained and incremental approach. But this is no longer the case. Today, the Court routinely relies on the ancillary powers doctrine to expand police powers. Over the last few decades, it granted every single Crown request for a new power except for the one in *Fleming*.[40] This trend has been widely criticized: *ex post facto* justification of police action undermines the rule of law and is inconsistent with this Court's role as constitutional guardian.[41]

---

[38] *Boudreault* at para 74.

[39] The Asper Centre adopts the analysis of the Court of Appeal of Quebec on this issue:

Judgment under appeal at 15–32.

[40] Richard Jochelson et al, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter" (2020) 28 Crit Criminol 107 at 116. *Fleming v Ontario*, 2019 SCC 45.

[41] Richard Jochelson, "Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference" (2009) 13:2 Rev Const Stud 209; James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31:1 Queen's LJ 1 at 19; Vanessa

25. The cause of the trend is this Court's failure to fully incorporate the *Charter* into the ancillary powers doctrine: "[r]ather than being anchored in a theory of rights as limits on police powers, the ancillary powers doctrine is anchored in a theory of police powers as limits on rights."[42] Unlike the "usual" process for adjudicating *Charter* breaches, in which courts conduct a justification inquiry separately and only after a breach finding, the current ancillary powers framework blends the two inquiries. As a result, *Charter* rights have been reduced to "lurking as a system of values," inherently secondary to police powers.[43] Unsurprisingly, lower courts struggle to incorporate the *Charter* into their analyses.[44]

26. This Court should course-correct by reframing the ancillary powers doctrine to give *Charter* rights paramount consideration. The Asper Centre recommends the Court of Appeal for Ontario's approach in *Figueiras v Toronto (Police Services Board)*.[45] Under this framework, the court first asks if the proposed power *prima facie* breaches a *Charter* right – not just whether it interferes with individual liberties.[46] The court then considers those breaches at the justification stage and only recognizes the proposed power if the cumulative impact of the *Charter* breaches is outweighed by the competing police interest – a heavy burden borne by the Crown.[47]

2) The ancillary powers doctrine cannot authorize groundless vehicle stops

27. The Asper Centre adopts the Respondents' submission that a common law power to randomly stop vehicles would *prima facie* breach ss. 7 and 9 of the *Charter*.[48] Applying the *Andrews*/*Fraser* framework, it would also breach s. 15(1). It would create a distinction based on the protected ground of race by adversely affecting Black and Indigenous peoples. This distinction would reinforce and perpetuate systemic discrimination. It would be constitutionally defective by failing to provide any minimum standard to the police.

MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) 57 SCLR 57.

[42] MacDonnell at 236.

[43] MacDonnell at 235. See also *R v Clayton*, 2007 SCC 32 at paras 61, 78.

[44] *R v Dhillon*, 2012 BCCA 254 at para 64.

[45] *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208 [*Figueiras*].

[46] *Figueiras* at para 66.

[47] *Figueiras* at para 119; *Fleming* at paras 76, 85.

[48] Factum, Respondent Joseph Christopher Luamba at paras 73, 106–07; Factum, Respondent Canadian Civil Liberties Association at paras 43, 70.

28. This Court has never previously considered s. 15(1) as a factor in the ancillary powers doctrine. It is time that it did. Some have argued that a police power leading to discrimination must be unjustifiable.[49] Regardless, the combined impact of breaching the ss. 7, 9, and 15(1) rights of innocent people who have done nothing to legitimately attract police attention is too great to be outweighed by a law enforcement interest in groundless stops. As in *Fleming*, such an "extraordinary" power would be evasive of judicial review. It reflects a pervasive interference with the fundamental dignity of Black and Indigenous people. Its justification would undermine trust of police in racialized communities.

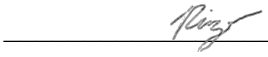
PART IV – SUBMISSIONS ON COSTS

29. The Asper Centre does not seek costs and asks that none be awarded against it.

PART V – ORDER REQUESTED

30. The Asper Centre takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of November 2025.



Megan Savard and Riaz Sayani
Counsel to the Intervener, David Asper
Centre for Constitutional Rights

[49] Benjamin L. Berger, "Race and Erasure in *R. v. Mann*" (2004) 21:6 CR-ART 58; Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99:2 Can Bar Rev 429 at 458–459.

PART VI – TABLE OF AUTHORITIES

Case Law

Case	Paragraph(s)
Andrews v Law Society of British Columbia, 1989 CanLII 2 (SCC), [1989] 1 SCR 143	5, 9, 16
[*Action Travail*] *CN v Canada (Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114	7, 9
Dickson v Vuntut Gwitchin First Nation, 2024 SCC 10	7
Eldridge v British Columbia (Attorney General), 1997 CanLII 327 (SCC), [1997] 3 SCR 624	5
Ewert v Canada, 2018 SCC 30	7
Figueiras v Toronto (Police Services Board), 2015 ONCA 208	26
Fleming v Ontario, 2019 SCC 45	24, 26
Fraser v Canada (Attorney General), 2020 SCC 28	11,14,16,17
Law v Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC), [1999] 1 SCR 497	7
Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69	18
M v H, [1999] 2 SCR 3	16
R v Abdullahi, 2023 SCC 19	6
R v Barton, 2019 SCC 33	6,7
R v Boudreault, 2018 SCC 58	13, 21
R v Chehil, 2013 SCC 49	8
R v Chouhan, 2021 SCC 26	6
R v Clayton, 2007 SCC 32	25
R v Dhillon, 2012 BCCA 254	25
R v Find, 2001 SCC 32	7
R v Golden, 2001 SCC 83	7, 8
R v Koh, 1998 CarswellOnt 5016 (ON CA), 1998 CanLII 6117	6
R v Le, 2019 SCC 34	7, 9
R v Mann, 2004 SCC 52	8
R v Morris, 2021 ONCA 680	7
R v Parks, 1993 CarswellOnt 119 (ON CA)	6
R v Pike, 2024 ONCA 608	8
R v Sharma, 2022 SCC 39	11, 14, 17
R v Simpson, 1993 CarswellOnt 83 (ON CA), 1993 CanLII 3379	8
Reference re an Act to Amend the Education Act, 1986 CanLII 2863 (ON CA)	16
Vriend v Alberta,[1998] 1 SCR 493	16

Secondary Sources

Article or Report	Paragraph(s)
Alison M. Latimer and Benjamin L Berger, "A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem" (2022) 104 SCLR (2d) 143	19, 21
Benjamin L. Berger, "Race and Erasure in *R. v. Mann*" (2004) 21:6 CR-ART 58	28
Justice Rosalie Silberman Abella, Commissioner, *Equality in Employment: A Royal Commission Report* (Ottawa: Minister of Supply and Services Canada, 1984) [Abella Report]	9, 16
James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31:1 Queen's LJ 1	24
Jennifer Koshan and Jonnette Watson Hamilton, "'Clarifications' or 'Wholesale Revisions'? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada" (2023) 114 SCLR (2d) 15	12
Joshua Sealy-Harrington, "The Charter of Whites: Systemic Racism and Critical Race Equality in Canada" (2023) 39 Windsor YB Access Just 544	12
Margot Young, "Zombie Concepts: Contagion in Canadian Equality Law" (2023) 114 SCLR (2d) 35	11
Richard Jochelson, "Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference" (2009) 13:2 Rev Const Stud 209	24
Richard Jochelson et al, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter" (2020) 28 Crit Criminol 107	24
Anthony Robert Sangiuliano, "Substantive Equality as Equal Recognition: A New Theory of Section 15 of the Charter" (2015) 52:2 Osgoode Hall LJ 601	15, 16
Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99:2 Can Bar Rev 429	28
Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) 57 SCLR 57	24, 25

Legislation

Enactment	Paragraph(s)
Constitution Act, 1982, ss 7, 9, 15, 24, 52, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	1–2, 4–5, 9–14, 16–19, 21–22, 27–28